REMARKS

I. Status of Claims

Claims 1-3, 7-58, and 62-85 are currently pending in this application. Claims 1, 78, and 83 are currently amended. New claims 84 and 85 have been added.

Independent claims 1, 78, and 83 have been amended to remove the limitation requiring specific amides of an alkanolamine and a C_{14}-C_{30} fatty acid. New claims 84 and 85 have been added to recite specific amides. Support for these amendments and new claims may be found, for example, in claims 1 and 6 as originally filed and at Paragraph [016] on pages 3-4 of the Specification. Accordingly, no new matter has been added.

II. Rejections under 35 U.S.C. § 103(a)

A. Cottard in view of Grollier

Claims 1-3, 7-45, 47, 55, 56, and 62-83 have been rejected under 35 U.S.C. § 103(a) as allegedly obvious over U.S. Patent Application Publication No. 2001/0023514 A1 to Cottard et al. ("Cottard") in view of U.S. Patent No. 4,357,141 to Grollier et al. ("Grollier"). Applicants traverse this rejection for at least the following reasons.

The Office alleges that Cottard "teaches a composition for oxidation dyeing of hair comprising oxidation bases . . . , at least one non-oxyalkyenated fatty alcohol[] . . . , [and] at least one associative polymer." Office Action at 2-3. The Office acknowledges that Cottard does not teach "a composition comprising fatty acid amide of an alkanolamine and C_{14}-C_{30} fatty acid," but alleges that Cottard "teaches and suggests the

use of fatty amide in the dyeing composition." *Id.* at 4. The Office further alleges that Grollier "teaches a composition comprising fatty amides such as oleic diethanolamide and stearic monoethanolamide as claimed in claim 1." *Id.* (citations omitted). The Office then concludes that "one having ordinary skill in the art at the time the invention was made, would be motivated to modify the composition of [Cottard] by incorporating the species of fatty acid amides as taught by [Grollier]." *Id.* at 4-5. Applicants respectfully disagree, for at least the reasons already of record and those set forth below.

In making a rejection under 35 U.S.C. § 103, the Office has the initial burden to establish a *prima facie* case of obviousness. *See* M.P.E.P. § 2143. In its recent decision in *KSR International Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734, 82 U.S.P.Q.2d 1385, 1391 (U.S. Apr. 30, 2007), the Supreme Court confirmed that the "framework for applying the statutory language of §103" was still based on its landmark decision in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966). Under *Graham*, there are four factors to be considered when determining whether an invention is obvious:

(1) the scope and content of the prior art;

(2) the differences between the prior art and the claims at issue;

(3) the level of ordinary skill in the art; and

(4) secondary considerations.

As detailed below, when the references cited by the Office are considered in view of these factors and in light of the Supreme Court's most recent guidance on obviousness as provided in *KSR*, it is evident that the Office has not established a *prima facie* case of obviousness, even in light of the *KSR* decision. Furthermore, even if the

Office had established a *prima facie* case of obviousness, Applicants submit that it would be rebutted by the evidence of the unexpectedly superior properties of the present invention submitted herewith.

1. The Office has not established a *prima facie* case of obviousness.

The teachings of the prior art differ from the claims at issue in that none of the references relied on by the Office, when taken alone or in combination, teach all the claimed limitations. Specifically, the combination of Cottard and Grollier does not teach the claimed specific range of ratios of the fatty amide to the associative polymer. Both elements are not even present together in either of the references such that any ratio of the elements, let alone the claimed one, could be determined. And as explained in previous responses, Cottard's general references to fatty amides in paragraphs [0324] and [0370] do not necessarily teach one of ordinary skill in the art that the entire genus of fatty amides would be useful in the disclosed composition.

Even assuming, for the sake of argument, that Cottard in view of Grollier did teach all of the claimed limitations, the Office has not provided sufficient motivation or an explicit reason prompting one of ordinary skill in the art to incorporate a specific fatty amide from Grollier into the composition of Cottard. In formulating a rejection under 35 U.S.C. § 103(a), an invention "composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art." *KSR Int'l*, 127 S.Ct. at 1741, 82 U.S.P.Q.2d at 1396. While there is not a rigid rule requiring application of the "teaching, suggestion, or motivation" test, it can provide helpful insight in determining whether the claimed subject matter is obvious.

See 127 S.Ct. at 1741, 82 U.S.P.Q.2d at 1396. In the analysis supporting the rejection, "the apparent reason to combine known elements in the fashion claimed by the patent at issue . . . should be made explicit." 127 S.Ct. at 1740-41, 82 U.S.P.Q.2d at 1396 (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)) ("[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness").

According to the Office, "one having ordinary skill in the art . . . would be motivated to modify the composition of [Cottard] by incorporating the species of fatty acid amides as taught by [Grollier]." Office Action at 4. But the Office does not provide an explicit reason why an ordinarily skilled artisan would select the specific fatty amides claimed for addition to the compositions of Cottard. Moreover, the Office asserts that "the ordinary artisan would have the reasonable expectation that any of the species of the genus [of fatty amides] would have similar properties and thus, the same use as the genus as a whole." *Id.* at 5. But if the technology is unpredictable, it is less likely that structurally similar species will render a claimed species obvious because it may not be reasonable to infer that they would share similar properties. *See* M.P.E.P. § 2144.08(e). The properties of chemical compounds can vary dramatically according to their structures. Thus, the Office cannot legitimately assert that one of ordinary skill in the art would reasonably expect all fatty amides (which can potentially contain myriad functional groups and vary in length of the fatty chain) to exhibit similar properties.

Therefore, the Office has not established a *prima facie* case of obviousness.

2. The evidence of unexpectedly superior properties submitted herewith rebuts a *prima facie* case of obviousness.

The Office advises Applicants to provide data or a showing to demonstrate that the claimed dyeing ingredients with the claimed ratio in the claimed composition demonstrates superior and unexpected results over the composition of the closest prior art of record. *See* Office Action at 7. While Applicants disagree that such results are necessary to establish the patentability of the claims for the reasons set forth above, in the interest of advancing prosecution, Applicants submit herewith the Declaration of Isabelle SCHLOSSER under 37 C.F.R. § 1.132 ("Declaration").

The attached declaration contains comparative test results of three compositions:

- **Composition B** is in accordance with the present invention, comprising: an oxidation dye, a non-oxyalkylenated fatty alcohol, an associative polymer (Quatrisoft LM 200), and a fatty amide of claim 1 (specifically, monoethanolamide of stearic acid, as in new claims 84 and 85), with a weight ratio of fatty amide of an alkanolamine and a C_{14}-C_{30} fatty acid to associative polymer of 13.33 (within the claimed range of 5-20). Declaration at ¶¶ 5 and 8.
- **Composition A** represents the composition of Cottard, and comprises at least one oxidation dye, at least one non-oxyalkylenated fatty alcohol (oleic alcohol), an associative polymer identical to that disclosed in paragraph [0371] of Cottard (Quatrisoft LM 200), and a monoisopropanolamide of coprah acids consisting of a mixture of C_8, C_{10}, C_{12}, C_{14}, C_{16}, and C_{18} fatty acids (disclosed in paragraph [0371] of Cottard]), with a weight ratio of fatty

amide of an alkanolamine and a C_{14}-C_{30} fatty acid to associative polymer of 4.89 (lower than the claimed range of 5-20). *Id.* at ¶¶ 6 and 8.

- **Composition C** represents a composition comprising an oxidation dye, an non-oxyalkylenated fatty alcohol, the same associative polymer as the other two compositions (Quatrisoft LM 200), and the same fatty amide as Inventive Composition B (monoethanolamide of stearic acids), but with a weight ratio of fatty amide of an alkanolamine and a C_{14}-C_{30} fatty acid to associative polymer of 4.37 (lower than the claimed range of 5-20). *Id.* at ¶¶ 7 and 8.

The data set forth in the Declaration demonstrate that Inventive Composition B shows unexpectedly superior results in viscosity and color intensity compared to Comparative Compositions A and C. *See* Declaration at ¶ 17. The results in Table (I) show that the viscosity of Inventive Composition B is significantly higher than those of Comparative Compositions A and C. *Id.* at ¶¶ 12 and 13. The viscosity of the inventive composition is nearly double the value for Comparative Composition A, which represents the composition in Cottard.[1] Applicants point out in paragraph [007] on page 2 of the specification that the viscosity of the dye composition is an important variable associated with the advantages of hair dyes (stability, ease of mixing, and surface qualities). Likewise, the results in Table (II) show that the color is significantly more intense or deeper for Inventive Composition B, as demonstrated by a decrease in L*

[1] The viscosity of Inventive Composition B (1160 centipoise) divided by the viscosity of Comparative Composition A (590 centipoise) equals 1.97, representing an enhancement of 97%. *See* Table (I) of Declaration at ¶ 12. The same calculation for Inventive Composition B and Comparative Composition C shows an enhancement of 66%.

value by >20% relative to Comparative Compositions A and C.[2] *Id.* at ¶¶ 15 and 16. One of ordinary skill in the art would conclude that the enhanced viscosity and color intensity of Inventive Composition B over Comparative Compositions A and C is an unexpected improvement. *See id.* at ¶ 17.

Applicants wish to note that the data provided in the attached Declaration are representative, and that none of the pending claims contain language requiring any particular viscosity or L* value.

Accordingly, Applicants have demonstrated superior and unexpected properties of the claimed invention sufficient to rebut a *prima facie* case of obviousness, and for at least the reasons discussed above, Applicants respectfully request withdrawal of the rejection.

B. Cottard in view of Grollier and Laurent

Claims 46, 48-54, and 57-58 have been rejected under 35 U.S.C. § 103(a) as allegedly obvious over Cottard in view of Grollier and further in view of U.S. Patent Application Publication No. 2002/0046431 A1 to Laurent et al. ("Laurent"). Applicants respectfully traverse this rejection for the reasons already of record and those set forth below.

The Office relies on Cottard and Grollier for the reasons set forth above. The Office further relies on Laurent merely for its alleged disclosure of a cationic polyurethane. *See* Office Action at 5-6. Even in view of Laurent, the Office has not

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[2] A lower L* value corresponds to deeper or more intense color, according to parameters measured by the colorimeter used by Applicants to determine color intensity. *See* Declaration at ¶ 14. Inventive Composition B shows a reduction in L* value of 25% and 22% compared to Comparative Compositions A and C, respectively.

established a *prima facie* case of obviousness because this combination of three references still fails to teach all the limitations of the claims. As discussed above with regard to Cottard and Grollier, Laurent lacks the amide of an alkanolamine and a C_{14}-C_{30} fatty acids and the specific ratios of amide to associative polymer of the present claims and, therefore, does not rectify the deficiencies of Cottard and Groller. The combination of references does not teach the specific range of ratios of fatty amide to associative polymer, as both elements are not present together in any of the references. Moreover, even assuming *arguendo*, that Laurent did teach a cationic polyurethane as the Office alleges, Laurent does not disclose the claimed amides of an alkanolamine and a C_{14}-C_{30} fatty acid. While Laurent generically discloses "Fatty amide" *(see* paragraph [0493]), it focuses on a single fatty amide, coconut acid monoisopropanolamide in the example (*see* paragraph [0494]). The disclosure of a genus encompassing potentially millions of compounds does not fairly suggest specific compounds encompassed by that genus when the disclosure focuses on other compounds as "preferred" or "typical." *In re Baird*, 16 F.3d 380, 382-83, 29 U.S.P.Q.2d 1550, 1552 (Fed. Cir. 1994). Thus, in this case, Laurent's disclosure cannot be said to satisfy the claimed limitation of amides of an alkanolamine and a C_{14}-C_{30} fatty acid, let alone in an amount meeting the specified ratio.

Moreover, the Office has not provided sufficient motivation or an explicit reason prompting one of ordinary skill in the art to make the proposed combination for the same reasons set forth above. The Office has not provided any additional evidence in view of the teachings of Laurent to establish such motivation. Thus, the Office has failed to establish a *prima facie* case of obviousness.

Even if, for the sake of argument, the Office had established a *prima facie* case of obviousness over the combination of Cottard, Grollier, and Laurent, Applicants submit that the unexpected results in the attached Declaration successfully rebut that case, as discussed above.

Accordingly, the Office cannot maintain the rejection under 35 U.S.C. § 103, and Applicants respectfully request reconsideration and withdrawal of the rejection.

III. Conclusion

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: July 25, 2007

By: 
Leigh M. Warren
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Attachment: **Exhibit A -** Declaration of Isabelle SCHLOSSER